Essays

The Italian Class Action: New Paradigm or 'Much Ado about Nothing'?

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Abstract

For several years there has been an increasing awareness that in order effectively to protect consumers' rights, it is necessary to improve legal action through the use of more adequate tools. This has stimulated efforts by policy makers and regulators worldwide to introduce actions for damages in their legal systems in the wake of the US experience of the class action (Federal Rule of Civil Procedure no 23). Bearing in mind the specific nature of US regulation, each legal system and especially those of a Civil Law model, had to refine and adapt their damages class action provisions in accordance with legal, economic, social and political factors applicable in each country. The risks attached to this process of refinement relate to the possible decoupling of new rules introduced to protect consumer rights from the pre-existing legal, cultural, social, political and economic environment of the country, itself not yet ready to accept the new rules that may threaten the legitimization of the new legal provisions. In consequence, some countries, pressured to achieve legitimization quickly through symbolic accountability and compliance, have frequently introduced class action regulation hastily without truly considering the systemic effects of the above-mentioned issues and their consequences on the legal system, above all from the perspective of application of the regulation in practice. Therefore, this study seeks to explore whether or not extant regulation on class action is capable of fostering effective consumer rights protection or if the prospective paradigms represent only 'much ado about nothing'. With this aim, the paper relies upon the juridification concept developed by Jürgen Habermas (1987) and focuses on the Italian regulatory environment. The research analyzes the changing regulatory context, employing a comparative methodology that contrasts the US model with the Italian one. The results highlight limitations of the complex system of norms of the Italian setting, providing a basis for critical thought on the positive aspects of this regulation and on areas for intervention and improvement.

I. Introduction

Consumer rights' protection is a topic which has gained renewed attention

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over the past fifteen years, especially after significant corporate failures such as those of Enron, World Com, Parmalat, etc. Such attention mainly resulted in strong commitment to improved legal process through the use of more adequate tools. What should be noted is that initially the raised focus on questions relating to the damages class action resulted in substantial pressure on the US courts where, thanks to the forum shopping rule, even in the absence of specific norms among the majority of legal systems worldwide, these actions were pursued.[1] Despite the initial acceptance of a number of cases by the US courts, in 2004 the emblematic case of *Hoffmann-La Roche*[2] is the first instance of rejection of a class action procedure by a US court. Such a rejection, officially justified on the basis of the unfounded nature of the action, was based on the policy of lightening the burden on US courts.[3]

Consequently, as a result of the rejection by US courts in 2004 of class action procedure from abroad, the efforts of policy makers and regulators brought about the introduction of actions for damages in several legal systems in the wake of the US experience of the class action (*Federal Rule of Civil Procedure* no 23).[4] Each legal system and especially those of a Civil Law model, had to refine and adapt the damages class action provisions specific

[1] The phenomenon is analysed by H.L. Buxbaum, 'Transnational Regulatory Litigation' *Virginia Journal of International Law*, 251 (2006). Regarding the judicial case of Royal Ahold, see the critical reflections proposed by J.C. Coffee Jr, 'Law and the Market: The Impact of Enforcement' 156 *University of Pennsylvania Law Review*, 275 (2007). Furthermore, with reference to in re Vivendi Universal Sa Securities Litigation (decided on 21 May 2007 by the US District Court, S.D. New York – 242 F.R.D. 76) the judicial reasoning is summarised. In particular, reference is made to the so-called 'delegated jurisdiction' which legitimized the transnational judgement and in consequence the strategy of the global players in order to benefit from opportunities offered by forum shopping. Such a delegated jurisdiction has been considered consistent with '*à la fonction de régulation économique qui incombe désormais aus Jurisdictions étatiques dans l'ordre global, dans l'intéret de la communauté des Etats et parfois meme application de normes communes*', see H.M. Watt, 'Régulation de l'économie globale et l'èmergence de compètences dé-léguées: sur le droit international privé des actions de groupe' *Revue critique de droit international privé*, 581 (2008).

[2] Case C-85/76 *Hoffmann* v *La Roche*, [1979] 3 CMLR 211.

[3] In this regard see the critical position proposed in R. Michaels and D. Zimmer, 'US – Gerichte als Weltgerischte?' *Praxis des Internationalen Privat- und Verfahrensrechts*, 451 (2004). See also N. Trocker, 'Class actions negli USA – e in Europa?' *Contratto e impresa/Europa*, 207 (2009).

[4] In particular, it is possible to refer to the legal experience of Continental Europe, which introduced a similar regime to that of North American, with the essential aim of overcoming the constraint that mass litigation can result, incongruously, in a multiplicity of individual actions. Nevertheless, class actions have gained increasing popularity throughout Europe. The European Parliament and Council Directive (EU) 1998/27 of 19 May 1998 on injunctions for the protection of consumers' interests, state that 'qualified entities' such as consumer associations or independent public authorities are authorized to take legal action on behalf of a group of persons affected by the conduct of commercial operators. In recent years, several EU countries have introduced rules on class actions in order to facilitate them. These include: Netherlands (1994); Portugal (1995); England and Wales (2000); Spain (2001); Sweden (2002).

to the US setting, to take into account of the legal, economic, social, and political factors featuring in those jurisdictions.[5] However, despite the extensive efforts of these countries, in many cases the process of refinement has been conducted without properly considering the pre-existing legal, cultural, social, political and economic environment within those which were not yet ready to accept the new rules and then likely to threaten the legitimization of the class action provisions. Indeed, a major problem that some countries had to face related to the pressures to achieve a quick introduction of the new measures, in order to assuage public opinion after the resonance of the scandals cited above. This rush to gain early legitimization through symbolic accountability and compliance may have lead some countries, above all the European ones, to neglect proper consideration of the systemic effect of previous cultural, legal, economic, and political archetypes, thereby resulting in serious negative effects of the new norms, in terms of very limited applicability.[6]

[5] Class actions for damages potentially allow the pursuit of heterogeneous policy aims not achievable through individual litigation. In this regard, Harald Koch observes that '(…) by doing so, we must put up with all of the problems of a poorly-motivated, cumbersome, and perhaps understaffed bureaucracy, as well as the question of legitimacy of representation'. See H. Koch, 'Non-Class Group Litigation Under EU and German Law' *Duke Journal of Comparative & International Law*, 358 (2001).

[6] It is possible to examine, *prima facie*, this particular aspect of the discipline present in the *code de la consummation* (L 421-1) in the French legal system. The legislation provides that consumer associations may take legal action independently, in the general interest of their members, presenting criminal complaints and intervening as a civil party in criminal proceedings, when it comes to a criminal law violation, when it is a criminal law violation that generates a collective prejudice and not limited to a particular subject. Civil associations may intervene in order to achieve the elimination of unfair terms in the general conditions of contracts or the cessation of unlawful conduct by a trader or professional who harms the collective interests of consumers. In these cases, the association may also seek compensation for the collective harm. Currently these standards are not particularly effective, as the consumer requirement is to send written mandates to associations and prohibit the most potentially harmful forms of advertising actions. In 2005, following President Chirac's proposal to give consumers and their associations remedies for collective action against abusive practices present in some markets, a working group was established in order to create a law on class actions. New civil procedures were introduced in 2000 under Spanish law. This law permits the complainant to be a party to proceedings as well as consumer groups affected by the same action, when members of the group are identified and the group constitutes a majority of its members (Art 6.7), when both associations are approved by the European Directive on injunctions in defense of the collective interests of consumers and when disseminated (Art 6.8). More specifically, the law (Art 11) permits associations which protect consumers and users the right to take legal action in defense of the interests and rights of its members, for purposes of the general interests of the category and the collective rights of groups of consumers affected by the consumption of a product or the use of the same service, where members there of are exactly identifiable. Art 15 provides that in proceedings initiated by the associations or affected consumer groups, all concerned will be contacted through mass media, if they have used the product or have taken advantage of the service that caused the damage. When those affected are all easily identified, they must already have been summoned by the same judicial authority; stakeholders are identified and

In this context, this study seeks to discover if extant regulation on class action is capable of fostering effective consumer rights protection or if the following paradigms represent only 'much a do about nothing'. With this aim, the paper relies upon the juridification concept developed by Jürgen Habermas and focuses on the Italian regulatory framework. The research analyses a changing regulatory context, comparing and contrasting the US model with the Italian one.[7] The focus on Italian regulation is founded on the view that the legge 23 July 2009 no 99 and the legge 24 March 2012 no 27 are the most recent ones at a European level and provide a more complete regulatory framework compared to other EU settings.[8]

The reminder of the paper is organized as follows:

The second section presents the framework of the analysis, ie the

when called will intervene even after the submission of the application but will only address those matters on which judgment has not been concluded. Where there is difficulty in identifying harm due to several unspecified factors, the course of the proceedings may be suspended for a period to be determined but not exceeding two months. After the start of the proceedings the identification and establishment of other parties shall not be accepted, but whose rights, however, can be separately asserted.

[7] An important overview is offered by A. Briguglio, *L'azione collettiva risarcitoria. (Art. 140-bis Codice del Consumo)* (Torino: Giappichelli, 2008), 33.

[8] On this topic, it is appropriate to highlight some aspects that characterize Italian legislation on consumer protection, specifically the present regulation in Art 2, para 445, of legge 24 December 2007 no 244 which established and regulated the class actions to protect consumers. The protection afforded to consumers, by Art 140-*bis*, which provides that the consumer associations and users included in the list at the Ministry of Productive Activities and the associations and committees that are sufficiently representative of collective interests are entitled to act to protect the collective interests of consumers and users by requiring the court at the place where the undertaking is established to ascertain the right to compensation and restitution of the sums paid to individual consumers or users on having regard to the parties to contracts concluded under Art 1342 Civil Code or by any non-contractual unlawful acts, unfair trade practices or anti-competitive behavior, when the rights of a plurality of consumers or users are affected. The Ministry's goals are identified as the protection of the rights of a plurality of consumers and users who find themselves in relation to the same company in the same situation ('homogeneous individual rights'); there may be damages resulting from breach of contractual rights or rights in any case due to the final consumer product (apart from a contractual relation), by anti-competitive behavior or unfair business practices. Legal standing in court is accorded to individual consumers, and through associations which grant mandates or committees involving them. It is possible for other consumers to join class action; membership implies the renunciation of any restitution or individual action for damages. The process is articulated in two phases; the first, once a ruling on the admissibility of class action; the second, aiming instead to the decision on the merits. If the application is accepted, the proceedings may culminate in a judgment of conviction to the settlement, on an equitable basis, with amounts due to those who have joined the action or after the definition of a uniform method of calculation for such clearance. The new legislation is not retrospective; the exercise of the action is permitted only for offenses committed after 15 August 2009, the date of entry into force of the measure. The need for a clearer definition of protectable legal situations through the new institute and a more precise identification of the person entitled to sue and be sued, as well as the theme of the institute retroactivity, in particular, have been the subject of much debate during the parliamentary review, resulting in the opinions given by the relevant parliamentary committees.

juridification concept developed by Habermas. The third section describes the US legal provisions for a class action (limited to Federal ones and not focusing on each individual state), while the fourth section explains Italian regulation. The fifth section compares the two different models through the lens of the juridification conception developed by Habermas and provides brief concluding remarks.

II. The Juridification View

Jürgen Habermas' contribution to democratic theory is well-acknowledged, especially with reference to his communicative model, which provides the testing ground and legitimisation tool for normative statements in a democratic context.[9] His theory of private and public autonomy is in itself dependent on a working framework where discursive practices involve all participants under ideal speech conditions.[10]

Habermas regards society as the combination of three elements; lifeworld (ie a normative context in which culture, tradition and identity can be reproduced); systems (ie a functionally definable arrangement of operations, such as organizations, which represent the tangible expressions of the lifeworld); and steering media (ie mechanisms such as power, money or law, that steer the interaction between lifeworld and systems). Steering media have to ensure that the systems reflecting the lifeworld but in the case of increasing complexity steering media possibly follow the systems instead of the lifeworld, thus leading to a colonization of the lifeworld by those systems. Habermas clarifies that it is not possible to predict which pathways will be followed in any specific situation and that the problem hangs on the difference between the types of legal norms.[11]

He distinguishes 'law as medium', which is justified solely by its appeal to procedure, from 'law as institutions', those which admit of substantive justification at the level of the lifeworld. He suggests that society is increasingly characterized by a juridification process which leads to growing formal, positive and written law.[12] Notably, juridification does not represent a simple expansion of the volume of regulation but a specific manifestation

[9] A. Asteriti, 'Social Dialogue, Laval-style' 5(2) *European Journal of Legal Studies*, 58-79 (2013).

[10] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg (Cambridge: Polity Press, 1996).

[11] J. Habermas, *The Theory of Communicative Action*, translated by T. McCarthy (Cambridge: Polity Press, 1987). See also C. Joerges, 'Integration Through De-juridification? An Interjection' 1(3) *European Journal of Legal Studies*, 1-34 (2008).

[12] J. Habermas, *The Theory of Communicative Action*, translated by T. McCarthy (Cambridge: Polity Press, 1984); in addition, Id, *The Theory of Communicative Action* n 11 above.

of the dialectic of the enlightenment in which welfarist intentions culminate in the 'violent abstraction' of regulation.[13] Juridification implies a proceduralization of relations which are morally substantive and this is corrosive of lifeworld values. Habermas' preoccupation here is with the colonizing, constitutive and condensing force that law (as a medium) exerts over social action in contrast to its potential for a facilitating, regulative one (law as institution, which is seen as an enabler). Habermas' view is that if it is possible to understand the constituent elements of 'good' and 'bad' law, it is also possible to understand the constituent elements of 'good' and 'bad' steering mechanisms.[14]

On these grounds, this paper focuses on evolving regulation for the protection of consumer rights, to understand if such control is regulative and amenable to substantive justification. The evaluation of steering mechanisms is complex and cannot be undertaken assuming, *a priori*, that all societal steering mechanisms from a particular steering media are 'regulative and amenable to substantive justification' or are 'constitutive and only legitimized through procedure'.

On this basis, embracing Gunther Teubner's view, in this paper we attempt to find out, in relation to regulation, if the fundamental limits of effectiveness have been reached, by focusing on the problem of structural coupling of this law with social state policies and various social life areas.[15] The breach of structural coupling appears when the relevance criteria are not met or when the condition of self-reproductive organization is endangered.[16] We follow Jane Broadbent and Richard Laughlin, despite Teubner referring to both Habermas' and Niklas Luhmann's thinking in explaining the conditions of relevance and self-reproduction and his understanding is developed here through Habermasian critical theory.[17]

Teubner's first condition (the relevance criteria) relies on a model of law developed by Habermas. Habermas suggests that the 'colonization of the lifeworld'[18] appears when materialized law 'gets out of hand' and, driven by political processes which do not adequately express the societal lifeworld, attempts to move societal systems into new levels of activity and concern. Such a material law is 'constitutive' (ie constituting new forms of behaviour)

[13] M. Power and R. Laughlin, 'Habermas, Law and Accounting' 21(5) *Accounting, Organizations and Society*, 441-465 (1996).

[14] J. Broadbent and R. Laughlin, *Accounting Control and Controlling Accounting: Interdisciplinary and Critical Perspectives* (Bingley, UK: Emerald, 2013).

[15] G. Teubner, 'Juridification – Concepts, Aspects Limits, Solutions', in G. Teubner ed, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate Antitrust and Social Welfare Law* (Berlin-NewYork: Walter de Gruyter, 1987), 3-48.

[16] J. Broadbent and R. Laughlin, 'Accounting and the Law: Partners in the Juridification of the Public Sector in the UK?' 4 *Critical Perspectives on Accounting*, 337-368 (1993).

[17] Ibid.

[18] See J. Habermas, *The Theory of Communicative Action* n 11 above, 33.

and can be only 'legitimized through procedure',[19] triggering societal systems into domains of activity detached from the societal lifeworld, thus breaking the 'relevance' criteria.

The second aspect of the breach of structural coupling, according to Teubner, relates to the disturbance of the self-reproductive processes of politics, law and social systems. Once an organization has been created and a degree of autonomy of action has been granted, there needs to be a demonstrable abuse defined in the context of a full democratic debate before encouraging an attack on the organizational lifeworld. When this intrusion comes from a societal steering medium, such as the law, without the backing from or the expression of the societal lifeworld, then it is not justifiable.[20]

If law breaches structurally-coupled situations, the repercussions are uncertain. Moreover, organizations are able to manage to appear compliant, for the sake of legitimacy, while pursuing alternative strategies and juridified law can play a destroying role, even though there will be all manner of powers to prevent this occurring and can either have disintegrating effects on the organizations being regulated or can be absorbed (albeit in costly ways).

On this basis, Teubner claims that responsible regulation of organizational behaviour should be decided by internal participants shifting the specification of detailed regulatory processes from outside legal direction to inside inner compulsion or self-regulation and that it is for law to try to ensure that these enabling discursive processes are conducted.

With this in mind we will examine the issues relating to the protection of consumer rights by analysing current laws in the context of the developed model of juridification discussed above, to identify if such law is regulative and amenable to substantive justification and thus able to support effective consumer protection.

III. The US Regulatory Setting

The Federal Rules of Civil Procedure, which were promulgated under the Rules Enabling Act of 1934, include in Rule 23 a comprehensive set of principles that govern class actions in Federal Court. This rule was designed to weed out cases that are unlikely to achieve the overarching goals of judicial efficiency and due process by prescribing the procedures that courts must follow to certify a case as a class action. Rules 23(a) and (b) set out the criteria that plaintiffs must meet to certify a case as a class action. Rule 23 (a) indicates the *Prerequisites to Class Action* and, to favour the aggregation of interests, requires the identification of a leading plaintiff with the mandate

[19] Ibid 365-366.

[20] J. Broadbent and R. Laughlin, 'Recent Financial and Administrative Changes in the NHS: A Critical Theory Analysis' 2(1) *Critical Perspectives on Accounting*, 1-29 (1991).

to promote the class action for the other class members, with judicial effects falling in the subjective sphere of each one. The leading plaintiff becomes the unique spokesperson of the class and is the only party entitled to remain in the judgment for the class, to attain either damages aims (damages class actions), to obtain financial remedies (mass tort cases) or inhibitory aims (injunctive class actions), to obtain both financial remedies and the determination of the offence committed.[21] In addition to the leading plaintiff, a primary role is played by the plaintiffs' law firms. These may be entrepreneurial firms that often act on their own and in advance by binding members to a class, with contingency fees and they assume all the economic burdens of any purposeful initiative, to embody the judgment for the class.[22]

Rule 23(a) requires the plaintiff to establish four elements, usually referred to as numerosity, commonality, typicality and adequacy of representation. It is normal to have in place the mandatory presence of the above characteristics to allow the exercise of the class action.

The numerosity criterion means that the procedure can be taken forward if the number of class members impedes the contextual access to judgment to all the components. Commonality implies that the class members require the tutelage of common and shared questions of law or fact, thus rendering the judgment of interests to all the members. Typicality lies in the fact that the claims and the objections raised by the plaintiff are homogeneous for the class and that the claim can be exercised by any member of the class. Then, the adequacy of representation refers to the judge's function to evaluate the adequacy of the leading plaintiff, the class and the class counsel, who are supposed to act fairly and adequately.

The leading plaintiff also must meet the requirements of one of Rule 23(b) subsections. Subsection 23(b) (3) requires proof that a class action would be superior to other methods of fairly and efficiently adjudicating the case and that common questions of law or fact predominate over individual issues. This subsection also provides that once a class is certified, class

[21] Timely intervention of the Supreme Court had circumscribed within defined technical lines the character of the 'punitive damages' at the end of the last century. Supreme Court USA, 26 June 1989, *Foro italiano*, IV, 174 (1990), with a note by M.S. Romano. In addition, Federal Court for the District of New Jersey, 9 March, *Foro italiano,* IV, 78 (1989), with a note by M. Santi Romano; Supreme Court USA, 4 March 1991, *Foro italiano,* IV, 235 (1991), with a note by G. Ponzanelli; Supreme Court USA, 7 April 2003, *Foro italiano,* IV, 355, with a note by G. Colangelo. See also G. Ponzanelli, 'I danni punitivi' *Nuova giurisprudenza civile commentata*, 27 (2008). The author clarifies that the US punitive damages represents aliens impossible to introduce in the Italian regulatory framework because of Institutional reasons preventing from a legal transplant.

[22] J. Cooper Alexander, 'An Introduction to Class Action Procedure in the United States' *Conference: Debates over Group Litigation in Comparative Perspective* (Geneva, July 2000), highlights that such an entrepreneurial nature of the plaintiff's law firm should be understood as one of the most interesting peculiarities of the US class action, being one of the elements that render the US class action a successful best practice.

members are bound by any judgment unless they opt-out of the litigation.

Rule 23(c) requires courts to decide class certification 'at an early practicable time'. The Supreme Court has instructed courts to engage in a 'rigorous analysis' of the pleadings, declarations and other record evidence to assess whether or not plaintiffs have satisfied those burdens. The issues may be plain enough from the pleadings to determine whether or not the interests of the absent parties are fairly encompassed within the named plaintiff's claim and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.

The certification provides a number of components of the necessary information, such as the identification of the class, the indication of the distinctive elements of the members, the illustration of the claim made by the class, the terms of the obligation in question, the illustration of the acts of defense, the indication and appointment of the class counsel. Indeed, if a class is certified, Rule 23(c) prescribes that the court must issue an order defining the class, identifying class claims, and appointing class counsel.

Rule 23(g) indicates the factors which the court must consider in making that appointment. Rule 23(c) also prescribes the content of the notice that the court must direct to class members after the class is certified, explaining the nature of the action and the class member's right to opt out. The notice answers the need for collective information in an appropriate form and structure such as the publication in newspapers and entering information in mass media circuits and it is mandatory in relation to class actions for damages.

Rule 23(d) describes the District Court's power to issue orders controlling the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument. It may require any step in the action, the proposed extent of the judgment or the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defences, or to otherwise come into the action.

Rule 23(e) specifies the terms under which a class action may be settled, dismissed or compromised. The settlement, voluntary dismissal or compromise refers to the agreement between the parts. The tutelage of common interests implies that the Court has the power to ask for clarification and modifications of the settlement. Moreover, for class actions for damages, the Court has also the power, in extreme cases, to reject the agreement.

In 1998, the Supreme Court amended Rule 23 to include subsection (f), providing for a permissive interlocutory appeal, at the sole discretion of a court of appeals, from a certification order. Rule 23(h) concerns the attorney's fee that may be awarded to counsel and the procedures that govern that determination.

Before concluding this brief review of the Rule 23 requirements, it is

worth noting that two further issues deserve more attention. Indeed, the US setting is well-acknowledged as a best practice model due to the presence of two peculiar characteristics; the (efficient) discovery devices and the opt-out right; not common in other regulatory settings and that due to their positive effects on the whole action, need to be separately considered.

1. Discovery Devices and the Opt Out Right

A primary element of distinction is related to discovery devices. The US legal system can be interpreted as an open one from a twofold perspective. First, from a functional point of view, adopting appropriate remedies and identifying proper devices to ensure correct solutions can overcome the complexity, the unpredictability and even possible aporias. Second, from a more substantial perspective, the system is responsive to what comes from the outside, thus being capable of accommodating complex needs.

A strong contribution to resolving the dysfunctionality of the legal system is made by the class action and Rule 23 of the Federal Rules of Civil Procedure provides the regulatory support for it. The characteristics of versatility, flexibility and deterrence underlying the class action recur in discovery devices, which can be understood as the correct indices to proper handling of disputes.

Discovery is usually divided into two phases; (1) pre-class certification discovery and (2) post-class certification discovery.

In the pre-class certification phase, discovery is limited to the issues relevant to the class-certification analysis, inclusive of the plaintiff's standing to pursue the asserted claims. If a class is certified and makes it to the post-class certification phase, discovery will focus on the merits of the underlying claims.

The issues relating to discovery devices represent complex questions mainly dealing with the correct relationships between the parties. More specifically, these questions are related to the exchange of information between the actors involved, as the US judicial system provides mechanisms for continuous dialogue between the contenders about the material of investigation and the acceptance of the notice pleading. These practices are legitimate only if they provide knowledge of useful elements to the integration of the *thema decidendum*, in addition to the initial knowledge deduced from the pleadings documents forming the basis for the judgment. Much depends on whether the dispute is substantial or minor, so the balance point may vary. Therefore, in routine cases discovery will be minimal and the efforts made and associated costs are proportional. For larger cases, discovery takes a decisive role and the procedure and its results are based on a complex set of facts, events and cognitive elements usually hidden from the counterparty that are revealed through a sophisticated process of discovery. In this way,

discovery devices become effective tools supporting class actions, as they underpin a strong collective claim and are necessary in achieving parity when confronting a powerful opponent.[23]

In addition to discovery devices and their role in ensuring successful actions, another peculiar and innovative element is the provision of the opt-out right for the class members in actions for damages.[24] In this regard it is worth noting that as soon as the certification is authorized by the court, the class is validated and the class members will be bound by the outcome of the trial or the transaction. From the time of the certification, each class member is no longer allowed to promote an individual trial for the same claim and will rely upon a common destiny.[25] However, for actions for damages only, as highlighted before, the current approach of Rule 23 is based on the opt-out option, that is the option for each class member to require his or her exclusion.[26] The self-exclusion involves notification to all class members. The notice is communicated using each available channel, including mass

[23] Ibid: 'Our discovery rules, which permit parties a wide scope for investigating the facts of the case by compelling information from their opponents, have also been essential for the success of class actions and, indeed, for the success of all consumer litigation. Of necessity, when consumers are injured by products or practices of large corporations, they lack much essential information about how the events came to occur. This information is not available to the public. If consumers are to have a reasonable chance to prove the case, they must be able to obtain information from the defendant'.

[24] H.L. Buxbaum, 'Defining the Function and Scope of Group Litigation: The Role of Class Actions for Monetary Damages in the United States', in P. Gottwald ed, *Europäisches Insolvenzrecht-Kollektiver Rechtsschutz (Veröffentlichungen der Wissenschaftlichen Vereinigung für Internationales Verfahrensrecht)* (Bielefeld: Gieseking, 2008), passim; N.M. Pace, 'Class action in the United States of America. An Overview of the Process and the Empirical Literature', 1 (2007), paper presented at the Conference 'The Globalization of Class Actions', Oxford, 13-14 December 2006, available at http://globalclassactions.stanford.edu/sites/default/files/documents/USA__National_Report.pdf (last visited 6 December 2016).

[25] It is worth noting that opt-out schemes are usually claimed to ensure that the group of claimants will be sufficiently large since the action is brought on behalf of the whole group. For example, in the US, on average opt-out rates are very low (less than zero point two per cent), given that parties cannot litigate individually. This increases access to justice, for consumer-users involved in multiple claims of low value. See T. Eisenberg and G. Miller, 'The Role of Opt-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues' *New York University Law and Economics Research Paper No 04–004* (2004); S. Issacharoff, 'Preclusion, Due Process and the Right to Opt Out' 77 *Notre Dame Law Review*, 1057, 1060 (2002).

[26] The opt-out approach offers advantages because the class consists of everyone who has not opted out, which will be the vast majority of class members, given consumers' inertia. However, '(…) The members of the Class who have filed timely and valid requests for exclusion in accordance with the Preliminary Approval Order and the Notice, and whose names appear on Exhibit 1 hereto, are no longer members of the Class and, accordingly, are not bound by tis Judgment. Requests for exclusion submitted by members of the Class whose names appear on Exhibit 1 hereto, are hereby approved by the Court and those persons may pursue their own individual claims and remedies, if any (…)' (Bausch & Lomb Securities Litigation, US District Court Western District New York – Order and Final Judgment, December 2004, Art 5).

media, so as to reach effectively as many stakeholders as possible. What should be noted is that the value of the opt-out option is related to the unfairness of many mandatory class actions. Indeed, although opt-out rights cannot always guarantee the fairness of a settlement, they can ensure that class members, particularly those with high stakes claims, will have the option of avoiding the agency problems frequently associated with class litigation and pursuing individual actions for redress.[27]

IV. Italian Regulation: An Example of Innovation at the European Level

The collective damages action to protect consumers (*l'azione collettiva risarcitoria a tutela dei consumatori*, Art 140-bis *Codice del consumo,* decreto legislativo 6 September 2005 no 206) was introduced into the Italian legal system with the legge 24 December 2007 no 244, and then further refined with the legge 23 July 2009 no 99, when renamed as class action (*azione di classe*) and lastly with the legge 24 March 2007 no 27.[28] The new Italian class action represents a unique innovation in the range of remedies to protect the rights of consumers. It represents a procedural device of a general nature, inspired by Federal US class action, replicating its salient

[27] S.T.O. Cottreau, 'The Due Process Right to Opt Out of Class Actions' 73 *New York University Law Review*, 1-49 (1998). See, also, C. Consolo and B. Zuffi, *L'azione di classe - ex Art. 140 bis Codice del Consumo. Lineamenti processuali* (Padova: Cedam, 2012); E. Cesaro and F. Bocchini, *La nuova Class Action a tutela dei consumatori e degli utenti. Commentario all'art. 140* bis *del Codice del consumo* (Padova: Cedam, 2012).

[28] Indeed, the legge 24 December 2007 no 244 has never been applied, so the class action has been effectively introduced with the legge 23 July 2009 no 99. This provision allows consumers to promote class actions individually, through associations and through committees. It implies that associations or committees are not mandatory required for the commencement of the action. An interesting issue pertains to judicial protection, so that in the case of the legge 23 July 2009 no 99, it was limited to the parties to the action or to those who adhered to it and not extended to the common interests of class members. This means that the action was aimed at the protection of collective identical interests rather than class interests, not extending the effects of the judgment beyond the parties involved in the trial. On the contrary, under the current legge 24 March 2012 no 27, instead of the collective interests, the reference is to homogeneous individual rights, protectable through the class action. For an overview of these developments, see G. Finocchiaro, 'Class action: una chance per i consumatori' 5 *Guida al diritto*, XXI–XXVII (2008); M. Cappiello, 'Una svolta per le cause risarcitorie ma occorrono ancora "aggiustamenti" ' 1 *Responsabilità e risarcimento*, 18 (2008); S. Mantovani, 'L'azione collettiva risarcitoria' available at http://www.filodiritto.com/articoli/2008/01/lazione-collettiva-risarcitoria/ (last visited 6 December 2016); Id, 'Azioni seriali e tutela giurisdizionale: aspetti critici e prospettive ricostruttive', in Id, *Le azioni seriali* (Napoli: Edizioni Scientifiche Italiane, 2008), 55; G. Comandé, 'Uso distorto dell'azione collettiva diventa un boomerang per il cittadino' 2 *Responsabilità e risarcimento*, 8 (2008); C. Consolo, 'È legge una disposizione sull'azione collettiva risarcitoria: si è scelta la via svedese dello "opt-in" anziché quella danese dello "opt-out" e il filtro ("L'inutil precauzione")' *Corriere giuridico*, 5 (2008).

features but also encompassing typically national characteristics.[29]

It is important to specify that a primary aspect that deserves attention is related to the scope of the class action provisions within the Italian setting. The legislator has limited the application of the class action to the matter of contractual relationships between consumer-users and professionals, which exclusively relates to the protection of consumers' rights, as contractual rights are rooted in private law (also in adherence to Art 38 of the *Codice del Consumo*). As a result, the class action device does not fully address the rights of consumers, excluding the protection of a) the constitutionally guaranteed and inviolable fundamental rights of the person; b) the rights recognized in the Charter of Fundamental Rights of the European Union; c) human rights subject to protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms; d) environmental rights[30] in terms of both the right to health harmed by pollution and environmental deterioration and the collective interest in the preservation of the environment; e) the rights of investors equated to those of consumers but guaranteed by two *Testi Unici*, the *Testo Unico Bancario* (TUB) and the *Testo Unico della Finanza* (TUF) thereby excluded from the protection of the *Codice del Consumo*. Clearly, such a reduction in the scope of the norm not only represents a crucial difference between the Italian and the US Federal class action but to some extent reduces the deterrence potential of the action.

Another difference relates to the right to activate the class action, which in Italy lies with individual harmed consumers who can directly promote the action as well as through associations or committees (that are admitted differently to the US Federal class action process). Consequently, the objective of the judgment is to ascertain the rights of class members as individuals damaged and having a direct interest in view of the liquidation of damages. There are no law firms involved in the judgment, as the contingency fee is not admitted in our regulatory framework.[31]

[29] A number of studies have addressed class action concerns over the past years. See M. Taruffo, 'I limiti soggettivi del giudicato e le "class actions" ' *Rivista di diritto processuale*, 609 (1970); P. Rescigno, 'Sulla compatibilità tra il modello processuale della "class action" ed i principi fondamentali dell'ordinamento italiano' *Giurisprudenza italiana*, 2224 (2000); P. Fava, 'L'importabilità delle class actions in Italia' *Contratto e impresa*, 166 (2004); M. Rescigno, 'L'introduzione della class action nell'ordinamento italiano. Profili generali' *Giurisprudenza commerciale*, 407 (2005).

[30] The questions pertaining the environmental damage are of central importance and deserve particular consideration, given the increasing media attention in these issues. See B. Pozzo ed, *La responsabilità ambientale. La nuova direttiva sulla responsabilità ambientale in materia di prevenzione e riparazione del danno ambientale* (Milano: Giuffrè, 2005); Id, 'La nuova direttiva del Parlamento europeo e del Consiglio sulla responsabilità ambientale in materia di prevenzione e riparazione del danno' *Rivista giuridica dell'ambiente*, 1 (2006).

[31] This kind of position is strongly supported by a great body of case-law; see for example the recent decision of the *Cassazione* (Corte di Cassazione 4 February 2016 no 2169). Regarding the contingency fee in Italian legislation, see C. Consolo and B. Zuffi, n 27

Another essential aspect to take into account is that Italian regulation has progressively switched from an initial approach based on the protection of identical interests (pursued with the laws emanated in 2007 and 2009) to an approach aimed at protecting homogeneous interests (2012). Homogeneity implies the presence of individual rights, which have some aspects (the substantial ones) in common with other consumer rights, while differing in other ways.[32] The law covers three types of homogeneous interests,[33] namely:

above; E. Cesaro and F. Bocchini, n 27 above. On the topic also recommend R. Caponi, 'Italian 'Class Action' Suits in the Field of Consumer Protection: 2016 Update', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2796611 (last visited 6 December 2016).

[32] The question is not one of collective interest, assimilated or not to a subjective right, or the assessment of the common issues, the occurrence of the offense or multi-offensiveness and its attribution to the defendant, but the individual interests, however homogeneous; individual claims compensatory damages and restitution, protection of which the courts can enforce either on an individual basis, in the usual forms and collectively through the mechanism in Art 140-*bis*. See, S. Menchini, 'Il provvedimento finale: oggetto, contenuto, effetti' *Analisi Giuridica dell'Economia*, 167 (2008); R. Caponi, 'Litisconsorzio "aggregato". L'azione risarcitoria in forma collettiva dei consumatori' *Rivista trimestrale di diritto e procedura civile*, 819 (2008); Id, 'Azioni collettive: interessi protetti e modelli processuali di tutela' 5 *Rivista di diritto processuale*, 1205 (2008); G. Costantino, 'La tutela collettiva risarcitoria 2009: la tela di Penelope' *Foro italiano,* V, 388 (2009); in addition, A. Riccio, 'L'azione collettiva risarcitoria non è, dunque, una class action' *Contratto e impresa*, 500 (2008). The current action formulation of class, as described, addressed these uncertainties since it attaches collective protection to the individual rights of more subjects, with protection that takes the form of an application for assessment of the liability of the defendant and an order to pay compensation and/or restitution. The protection can result in a final judgment that determines the precise amount of the claims of the promoters and members or in a measure that establishes the existence of the standard measurement of an award, establishes uniform criteria for liquidation, refurbishing and subsequent autonomous individual processes. Cf G. Alpa, 'L'art. 140-bis del codice del consumo nella prospettiva del diritto privato' *Rivista trimestrale di diritto e procedura civile*, 379, 382 (2010).

[33] The homogeneous nature of the interests protected by the Italian class action is well-established by the literature and case-law but concerns are recognized because it is necessary to start from the premise that with the class action, the legislature seeks to achieve simultaneous processes in relation to individual claims promoted by consumers and users, provided that such claims have as their object the protection of related rights that are united by common characteristics such as the requirement to justify a serial assessment and procedural joint scrutiny. See R. Poli, 'Sulla natura e sull'oggetto dell'azione di classe' *Rivista di diritto processuale,* 38 (2012); A. Giussani, 'Intorno alla tutelabilità con l'azione di classe dei soli diritti "omogenei" ' *Giurisprudenza italiana*, 3 (2014). Instead, the Supreme Court addressed the issue of homogeneity of consumer and user protection in the following decisions Corte di Cassazione 13 February 2009 no 3640, *Foro Italiano*, I, 1901 (2010); Corte di Cassazione 9 December 2002 no 17475, *Foro Italiano*, I, 1121 (2003). Additionally, there have been recent judgments in Tribunale di Milano ordinanza 9 December 2013 and Tribunale di Venezia ordinanza 12 January 2016. The court which handed down this latest judgment predicted that '*È inammissibile una azione di classe proposta da un consumatore ed avanzata al fine di accertare una presunta pratica commerciale scorretta posta in essere da una casa automobilistica, attraverso la quale sarebbero stati omologati e diffusi dati errati e scorretti circa le emissioni inquinanti e i consumi di carburante di numerose autovetture in quanto non sussistono diritti omogenei al ristoro del pregiudizio derivante ai consumatori, come è invece espressamente richiesto dal Codice del Consumo*'.

a) formal homogeneity, derived from the same type of contract,
b) substantial homogeneity, derived from the same type of damage,
c) absolute homogeneity, derived from objective situations repeated over time.

From a technical point of view, the Italian class action is characterized by a self-inclusion mechanism exerted by consumer-users, the so called opt-in system,[34] centred on the crucial importance ascribed to the explicit manifestation of intention by the subjects involved to adhere to the claims made by others.[35] Thanks to this mechanism the judgment is effective for the proponents and for the adherents, who no longer can activate any action individually. The opt-in implies that each adherent has to communicate and deposit at the Court Registry information concerning his domicile, claim and any supporting evidence by the one hundred twentieth day after the final term for announcement of the action. The announcement is aimed at gaining the maximum support possible for the judgment and is mandatory in order to proceed with the action. Clearly, participation is expected to be 'adequate' because either an unreasonable expansion or an unjustified restriction would endanger the ability of the procedure to achieve the well-known deterrence and equity expectations ascribed to the class action.[36] The opt-in system is rather different from the US Federal approach of the above-noted opt-out option. This latter allows the self-exclusion from the class in accordance with technical mechanisms that are completely dissimilar to the European ones aimed at reducing the very high legal and procedural costs for both the State and the parties involved. Notably, within the European setting, any decisions on common concerns underpin an individual judgment referring to the facts and/or laws common to the class. Bearing this in mind, it is worth considering that the auto-inclusion system proposed by the Italian regulator, given the

[34] It is worth noting that the opt-in system was in being within the US setting before the 1966 reform. See H. Kalven Jr and M. Rosenfield, 'The Contemporary Function of the Class Suit' *University of Chicago Law Review*, 684 (1941). In addition, on the choice to move to an opt-out system see B. Kaplan, 'Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)' 81 *Harvard Law Review*, 356 (1967). On the debate focusing on the possible re-introdution of the opt-in system – a failure so far – see A. Miller, 'Of Frankenstein Monsters and Shining Knights: Myth, Reality and the Class Action Problem' 92 *Harvard Law Review*, 689 (1979); P. Wells, 'Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal' 16 *Harvard Journal of Legislation*, 572 (1979); E.H. Cooper, 'Class Action Advice in the Form of Questions' 11 *Duke Journal of Comparative & International Law*, 231 (2001).

[35] The Italian approach to the opt-in system and its implications are usefully explained by C. Consolo, n 28 above, 5; in addition, Id, 'L'art. 140-bis: nuovo congegno dai chiari contorni funzionali seppur, processualisticamente, un poco "Opera aperta" ' *Foro Italiano*, V, 205 (2008).

[36] This kind of position is strongly supported by A. Briguglio, 'Class Action Arbitration in Italia: spunti di metodo per la (eventuale) prosecuzione delle indagini' available at http://www.judicium.it/admin/saggi/630/Briguglio%20judicium%20maggio%202015.pdf (last visited 6 December 2016). The author opines that the Italian class action would represent a defense of undertakings filter, as a barrier to provocative or spurious actions.

limitations derived from pre-existing constitutional, civil, and procedural norms, represents a unique and innovative solution to introduce a mechanism aimed at reducing the risk that each complainant would promote individual claims.

The opt-in system is not alone in identifying the Italian scenario as an innovative one at a European level, because also the issues relating to the homogeneous individual rights deserve attention, especially if other system that are well-recognized as valuable are considered. Reference is to the German legal system. A number of studies have argued that the '*Kapitalanleger -Musterverfahren*' (KapMuG) introduced in Germany in 2005 might be considered a successful experiment.[37] The KapMuG is a device that finds application in the presence of a number of parallel cases and that operates by introducing a pilot-process (*Muster-Prozess*) and contextually suspending the other judgments, so as to solve a common controversial issue in an identical and binding manner for the subjects involved. In this way, thanks to the efficacy of the judgment of the pilot-process and for parallel cases, there is an increase in the efficiency of judicial protection.

At first sight, the German model appears as an effective one when considering the need to pursue efficient aggregated protection while respecting individual guarantees for the parties involved. Actually, despite this positive element, the German model is highly different from the Italian one by reference to the approach chosen, which neglects the definition of the class and the commencement of unitary proceedings. In so doing, the German model remains limited to the protection of identical rights, which have long been superseded by the Italian provision of the protection of homogenous individual rights. Moreover, the absence of any procedures to form the class and to ascertain the class claim reduces the deterrence capability of the German model, especially with reference with the reputation of the companies involved and awareness of the public opinion. Therefore, the innovative and broad impact of the Italian legal system within the European context remains

[37] Gesetz zur Einführung von Kapitalanleger-Musterverfahren (*KapMuG*), 16 August 2005, *Bundesgesetzblatt Jahrgang* (BGBI) Teil 1, no 50 (2005), ausgegeben zu Bonn, August 19th 2005. See also M. Strüner, 'Model Case Proceedings in the Capital Markets – Tentative Steps towards Group Litigation in Germany' *Civil Justice Quarterly*, 250 (2007). R. Caponi, 'Modelli europei di tutela collettiva nel processo civile: esperienze tedesche e italiane a confronto' *Rivista trimestrale di diritto e procedura civile*, 1229 (2007); E. Camilleri, *Contratti a valle: rimedi civilistici e tutela della concorrenza* (Napoli: Jovene, 2008), 305; C. Consolo and D. Rizzardo, 'Due modi di mettere le azioni collettive alla prova: Inghilterra e Germania' *Rivista trimestrale di diritto e procedura civile*, 891 (2006); C. Consolo, 'Class actions "fuori dagli Usa": qualcosa si muove anche alle nostre (ex-) frontiere settentrionali almeno quanto al case management' *Rivista di diritto processuale internazionale e arbitrato internazionale*, 38 (2006); C. Poncibò, 'La controriforma delle class actions' *Danno e responsabilità*, 131 (2006). Lastly, C. Di Marzo, 'La via italiana alla class action per danni extracontrattuali ed i principali modelli di tutela collettiva risarcitoria' *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 428 (2010).

unquestionable.

Despite this, several limitations are still detectible within the Italian approach in comparison to US best practice. The following section will explain this issues in more detail.

V. Discussion and Concluding Remarks

This paper, focusing on the Italian setting, employs a framework to understand if extant regulation for the class action is operable and amenable to substantive justification and thereby able to afford effective consumer rights protection.

In line with the framework, the analysis allows us better to determine whether or not in the case of the regulation that we examine, the fundamental limits of effectiveness have been reached, by focusing on the problem of structural coupling of this law with social state policies and various real life areas. As already stated, the breaching of structural coupling appears when the relevance criteria are not met or when the condition of self-reproductive organization is endangered.[38]

With reference to the first of the two conditions, the relevance criteria, it is worth recalling that Habermas suggests that materialized law 'gets out of hand' and, driven by political processes which do not adequately express the societal lifeworld, attempts to move societal systems into new levels of activity and concern, thus breaking the 'relevance' criteria.

In this regard, what should be noted is that a first positive aspect to consider relates to the fact that the Italian class action represents the culmination of a progressive enrichment and enlargement in the number of measures available, their applicability and their social implications. This more systematic and renewed regulation was long-awaited and generally desired and above all is surely in line with the lifeworld of reference, which is characterized by increasing commitment to the social and ethical importance of consumer rights protection. On this basis, it is possible to argue that the norms examined satisfy the relevance criteria. However, the Italian class action provisions are still affected by several limitations by comparison to the US approach, that comprise the effectiveness of the actions undertaken.

The main differences between these two systems are shown in the table 1 below.

Table 1 – A brief comparison of the US and Italian settings

[38] J. Broadbent and R. Laughlin, 'Accounting and the Law: Partners in the Juridification of the Public Sector in the UK?' n 16 above, 337-368.

	US setting	**Italian setting**
Aims	Consumers' rights protection	Consumers' rights protection
Scope	Broad	Limited to contractual relationships between consumer-users and professionals
Deterrence	Broad	Limited to the scope of the action
Subjects entitled to the procedure	Leading plaintiffs and law firms	Consumer-users, Consumer Associations, Committees
Pros	The entrepreneurial nature of the law firm favours the increase in the number of actions carried out	The norm has a twofold nature: procedural and substantive
Cons	Excessive procedural emphasis	The contingency fee is not allowed, the law firms, of which there are just a few, are not involved in the action
Inclusion	Opt-out system	Opt-in system
Discovery devices	Pre-trial phase (reduced legal costs)	Trial phase (high legal costs)

A primary aspect to highlight is that, despite the fact that in both cases regulators commence with the need to achieve the same aim, ie the protection of consumer rights, the two scenarios, due to pre-existing legal frameworks of the countries examined, result in rather different approaches.

In particular, the relative scope of the starting points in each jurisdiction represents a crucial issue which deserves further attention. Indeed, the differences in scope have a direct effect on the deterrence power of the class action, so that in Italy, and despite its system being regarded as the most innovative one in the European context, as argued in the fourth section, is greatly reduced.[39] Another relevant difference refers to the subject entitled

[39] This point of view was supported by authoritative literature that has identified a new procedural instrument in the Italian class action. It found potential applications, as well as numerous problematic aspects of the recent discipline. According to scholars, the Italian class action presents itself as an innovative tool, which allows the individual consumer to take action before a civil court for damages or repayment of amounts not only for himself but also for all other consumers who, finding themselves in a substantially similar situation to that of the applicant, become part of the class and adhere to the action. Access to forms of collective legal protection, thanks to the class action, however, is no longer the exclusive preserve of significant consumer associations, but is also open to individual consumers. See, G. Chiné and G. Miccolis eds, *La nuova class action e la tutela collettiva dei consumatori* (Roma: Nel diritto, 2010), 69. Conversely, the idea supported by other authorities on the subject of the Italian class action, for example, Professor Briguglio takes the view that this

to the action because in the US setting the law firms, absent in the Italian approach due to the fact that the contingency fee is not allowed, play a crucial entrepreneurial role also ensuring a constant increase in the number of actions carried out, which are just a few in Italy.[40] On the other hand, a fundamental feature of the Italian approach that in the US is actually lacking is that the class action regulation has a twofold nature, namely procedural and substantive and is then potentially able to be more generally relevant in the European context (eg with reference to the opt-in provisions, which can be regarded as the best possible option for these jurisdictions, where the efficient opt-out of the US practice cannot be applied) because it supersedes the excessive emphasis on procedural issues. Despite this, and differently from the US, the absence of any provisions for pre-trial discovery devices in the Italian model still threaten the effectiveness and feasibility of the action due to the high legal costs associated with the judgement and the indefinite length of the procedure.

The limitations described above, interpreted in the light of the second element of the theoretical framework that allows an evaluation of the breach of structural coupling (ie the self-reproductive capability of politics, law and social systems) represent crucial issues to take into consideration. Indeed, Broadbent (1991) clarifies that that once an organization has been created and a degree of autonomy of action has been granted, there needs to be a demonstrable abuse defined in the context of a full democratic debate before encouraging an attack on the organizational lifeworld (Broadbent and Laughlin, 1993). Where this intrusion comes from a societal steering medium, such as the law, without the backing from or the expression of the societal lifeworld,

remedy is, in its essential structure and as a first step, best referred to arbitration. This is said to be more objective, and, as identified by para II (contractual rights or rights compensatory damages against the manufacturer arising from unfair trade practices or anti-competitive behavior), definitely available and indeed negotiable (for the avoidance of doubt, see the last paragraph of Art 140-*bis*) both as to compatibility between his way of execution and outcome, on the one hand and the basis of voluntary arbitration on the other. Since someone may not be party to a process, the positive or negative effects of the decision are themselves sufficient and compatible with the bilateral agreement of compromise and arbitration (see A. Briguglio, n 36 above, 1-14).

[40] The low use of the Italian class action is a recurrent problem in our legal system. Research has analyzed the problem in numerous studies and despite having found in this legal instrument 'significant new elements to the system of protection of rights' also records low utilization in practice. The low usage is due to high litigation costs and the duration of the process. These aspects, according to some authors, might undermine the usefulness of the consumer protection mechanism introduced in Italy. Certainly the principle captures the enormous potential of the class action introduced by Art 140-*bis* of the Consumer Code because it allows members of the group to 'organize themselves and make their voices heard' but it cannot hide the negative aspects that have a significant impact on the usefulness and effectiveness of the legal instrument. See, G. Abbamonte, 'L'oggetto della giustizia nell'Amministrazione' *Diritto e processo amministrativo*, 2 (2013); M. Santise, *Coordinate ermeneutiche di Diritto Amministrativo* (Torino: Giappichelli, 2014), 365-366.

then it is not justifiable. In the case of Italian regulation for the class action, the condition of self-reproductive organization is not respected because law has determined a situation in which, despite the high legal costs, the procedures are not able effectively to mediate the weak position of consumers and the strong position of the companies on a number of issues. To this effect, the Italian literature has considered the class action introduced by Art 140-*bis* of the Consumer Code as '*conclusione fin troppo ardita e perfino vessatoria dal punto di vista della tutela effettiva del consumatore e/o della classe di appartenenza*'.[41] On the contrary, the class action legal provisions of Rule 23 provide an efficient means of mediation between the general and particular interests of the class and of its members respectively. The class action, as it is conceived within the US setting, represents the sole mechanism properly able to mediate the weak position of consumers and the strong position of companies.

The deterrence aspect condenses the utilitarian calculation with the behavioral morality. Both aspects are essential for a successful class action and, if the utilitarian calculation ensures weighting the risks resulting from a judicially imprudent conduct, the behavioural morality is an expression of the ethical conduct of the case, so as to achieve a virtuous exclusion of unlawful conduct. This is not to say that the Italian approach will be never able to achieve these aims. Conversely, possible areas of improvement may be highlighted to achieve more effective consumer rights' protection. First, two connected needs are represented by the enlargement of the scope of the action, and efforts to expand solutions capable of being introduced in the entrepreneurial law firms' procedure. Second, it is worth considering in the foreseeable future the need to develop a lean procedure which admits pre-trial discovery devices, thereby reducing the length of the process and its costs.

In summary, the research show that there are limitations in the rules examined and they provide a basis for examination of critical policy. We can conclude that the Italian class action provisions represent a good starting point, which, however, is not yet an example of law which is effective and amenable to substantive justification. More specifically, in line with Broadbent and Laughlin[42] highlighting reflexive law being far from reality, we maintain here that there are potential alternatives to excessive regulation. This is not to say that the current regulatory provisions should be reduced, leaving space for practice. On the contrary, our concern surrounds the need for incorporating into current procedure the above-cited aspects that are still neglected and that, consequently, threaten the effectiveness of the regulation in supporting

[41] This reflection offers authoritative Italian literature on the subject of class action introduced by Art 140-*bis* of the Consumer Code and that this study aims to share. See, A. Briguglio, n 36 above, 7.

[42] J. Broadbent and R. Laughlin, 'Accounting and the Law: Partners in the Juridification of the Public Sector in the UK?' n 16 above, 337-368.

consumer rights' protection Clearly, these kinds of improvements will be possible only by embracing a broader view. We believe that our results have a threefold value.

First, they complement the theoretical framework showing its relevance in examining the issues relating to judicial processes in messy regulative contexts such as the one investigated in this paper. Second, our findings shed light on the type of change that regulation has fostered over past years, especially focusing on the capability of regulators to work towards effective consumer protection. From this perspective, the real contribution of this work lies in its ability to allow us to identify the existence of any limitations within the Italian system of regulation, highlighting overlaps and/or lack of multiple requirements. Furthermore, the findings provide a basis for critical thinking emphasizing that any weaknesses in the current Italian class action procedures do not relate to compliance but reflect certain inefficiencies of regulation *per se*.

Certainly the Habermas Juridification's theory has revealed the empirical value of the idea that the class action forms part of the study of sociology of law. As we have already noted in other sections of the paper, Habermas is based on the concept of legalization (*Verrechtligung*) to further the development of the welfare state.

In general terms, juridification refers to an increase of the formal or written law, either in the form of a conducting hitherto unregulated expansion of rights or by way of broadening rights by way of more detailed regulation of conduct already regulated by law.

In this context, the Federal class action of the United States presents itself as a remedy more related to the ideas proposed by Habermas' theory and allows for further approaches to dealing with the claims of American consumers.

In fact, these needs have not been met by the class action characteristics of Italian law and the Federal law of the United States presents itself as a means of guaranteeing the protection of the basic needs of citizens, perhaps because it is heavily based on the capitalist nature of that culture.

Conversely, Art 140-*bis* of the Italian Consumer Code looks like a standard which is too detailed and decontextualized compared to other rules of the Italian Civil Code intended for the protection of citizens' rights and remedies in the Code of Civil Procedure. Unlike the article of the Italian Consumer Code in question, Federal Rule 23 manages to be a better remedy for ensuring the affirmation of the principles of fairness and equity among parties and affords protection for American consumers arising from wrongs committed by corporations.

We can now return to propositions in Habermas' Juridification Theory and conclude that the American system, which is more evolved than the

Italian system, shows that welfare laws can be interpreted in terms of the institutionalization of the rights of the life-world against economic and political systems.

In this way US Federal Rule 23 manages to ensure individual protection as well as social rights on the basis of a balance of the principles of freedom and equality between parties. The development of the right of citizens to welfare and the protection of their interests is the basis of Habermas' theory and these issues are given better protection by way of US Federal Order, Rule 23, where they are found especially in class action requirements for 'commonality' and 'adequacy'.

Therefore, from this perspective, the third contribution is more practical, in that this paper may be interpreted as a starting point to encourage regulators and lawyers towards collaboration and dialogue to find alternative ways and strategies further to improve consumer rights' protection. Otherwise, the Italian class action, a potentially relevant paradigm, will be only *much a do about nothing*.